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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. LARRY DEMINTER, Defendant and Appellant.	B205558 (Los Angeles County Super. Ct. No. BA272719)

APPEAL from a judgment of the Superior Court of Los Angeles County, George G. Lomeli, Judge. Affirmed.

Mark Alan Hart, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Victoria B. Wilson and Noah P. Hill, Deputy Attorneys General, for Plaintiff and Respondent.

Larry Deminter appeals from his judgment of conviction for murder and attempted murder. The primary issue on appeal is whether the trial court erred in compelling appellant's wife to testify for the prosecution, in violation of Evidence Code section 972, subdivision (f).[1] We find no error. Appellant also challenges the imposition of an additional term of 25 years to life for count one under Penal Code section 12022.53, subdivision (d) as a violation of the double jeopardy doctrine. That issue has been decided against appellant's position by the California Supreme Court, and under principles of stare decisis, we reject the argument.

FACTUAL AND PROCEDURAL SUMMARY

Appellant was charged and convicted of the drive-by shooting of Travon Gipson and Cherelle McNeal as the victims walked down a street in Los Angeles. Gipson died of his wounds, McNeal was shot in the feet or ankles. A charge of attempted murder of a third victim, Letisha Davis, resulted in a not guilty verdict. The jury found true firearm use allegations, but found not true an allegation that the crimes were committed for the benefit of a criminal street gang. Appellant was sentenced to an aggregate term of 75 years to life in state prison, plus a consecutive term of life. This timely appeal followed.

DISCUSSION

I

The primary question in this appeal is whether the trial court erred in compelling appellant's wife Candace to testify, in violation of the spousal privilege codified in sections 970 and 971.[2] Section 970 provides: "Except as otherwise provided by statute, a married person has a privilege not to testify against his spouse in any proceeding." Section 971 provides: "Except as otherwise provided by statute, a married

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[1] Statutory references are to the Evidence Code unless otherwise indicated.

[2] The confidential marital communication privilege under section 980 is not at issue in this case.

person whose spouse is a party to a proceeding has a privilege not to be called as a witness by an adverse party to that proceeding without the prior express consent of the spouse having the privilege under this section unless the party calling the spouse does so in good faith without knowledge of the marital relationship."

The appeal turns on the applicability of the exception codified in section 972: "A married person does not have a privilege under this article in: (f) A proceeding resulting from a criminal act which occurred prior to legal marriage of the spouses to each other regarding knowledge acquired prior to that marriage if prior to the legal marriage the witness spouse was aware that his or her spouse had been arrested for or had been formally charged with the crime or crimes about which the spouse is called to testify."

Appellant argues that the record does not establish that Candace was aware, prior to the marriage, that he had been arrested or formally charged with the murder and attempted murder crimes at issue in this case. He contends the error was prejudicial because her trial testimony linked him to the car used in the crimes and to Michael Hampton, a person later found with the gun used in these crimes. In addition, Candace's trial testimony established a motive based on a fight she and appellant had on the morning of the murder.

The parties disagree about the standard of review on appeal. Appellant claims independent de novo review is appropriate, citing *People v. Seijas* (2005) 36 Cal.4th 291, 304. Respondent argues that the correct standard of review is the deferential abuse of discretion standard. It contends that the court in *People v. Seijas*, *supra*, 36 Cal.4th at page 304, limited de novo review to situations affecting a defendant's right to confront witnesses. We need not resolve this conflict because we find no error under either standard.

Appellant argues that Candace's knowledge before the marriage that he was under investigation for these crimes was not enough to satisfy the conditions of section 972, subdivision (f) which require the testifying spouse be aware that his or her spouse has been arrested for, or formally charged with the crime. He cites a statement by the trial court during a colloquy with counsel. Defense counsel had argued that while appellant

may have been charged with the crimes in October 2004, he did not know the charges had been filed and neither did Candace. Defense counsel asked how Candace would find out if appellant did not know, inquiring whether Candace would be required to check the records. The court said: "It doesn't provide for that. It says 'formally charged.' It doesn't say how she goes about learning it. It says 'formally charged.'" Defense counsel argued it was the prosecution's burden to prove that Candace was aware of either appellant's arrest or the formal charges against him. The trial court indicated that it understood the defense argument, but did not say that it agreed.

It is uncontested that appellant and his wife, Candace[3] were dating when these crimes were committed in June 2004. They married in May 2005. The trial court conducted a hearing pursuant to section 402 to determine whether the exception was satisfied. Candace was asked about her interview with Detective Abdul in September 2004. He told her he was investigating appellant regarding a homicide that occurred that year. Candace equivocated about whether she knew that charges had been brought against appellant in this case.

She was asked: "Now, in May of 2005, when you married Mr. Deminter, . . . were you aware at that time that homicide charges had been brought against Larry Deminter?" She answered: "I'm not really sure. Umm, at the time, I don't remember if the charges were brought up yet." She added that she did not remember.

Candace testified that she discussed with the detective the fact that appellant was being accused of homicide prior to marrying him. She knew appellant was in custody on an unrelated robbery charge when they married. The prosecutor asked: "Did you also know that he was being accused and charged with homicide potentially? Did you know that?" She answered "Yes."

On cross-examination, defense counsel asked: "In your interview with Mr. Abdul, did he tell you that Larry was going to be charged with a crime?" Candace said: "At the time, I don't remember if he told me he was being charged, when he . . . interviewed me."

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3 Candace's maiden name was Hubbard, and she was sometimes referred to by that name.

Defense counsel asked: "And is it your testimony that before you married Mr. Deminter, you were aware that he was in fact being charged with a crime, whether it be homicide--." Candace interrupted and said: "Yes, I believe so. I'm not sure. I'm not sure if he was charged or being accused at the time, but I know that it was brought up and I was questioned about it."

When asked by the court, Candace testified that she did not know appellant was arrested for homicide, but the detective questioned her a few months after appellant went to jail. The judge asked: "But you knew he was charged with bank robbery and/or homicide?" She answered: "Yes, I guess." On recross-examination, defense counsel asked Candace what she meant when she said she guessed. Candace testified: "I'm not sure if he was charged with a homicide at the time, but I know that he was charged with bank robbery."

According to the prosecutor, appellant was charged with these crimes on October 14, 2004. The information was filed on February 22, 2007. It was stipulated that appellant was served with the arrest warrant in this case on February 15, 2005, before he and Candace married.

The trial court ruled: "[B]ased on everything I have heard here, . . . the court's ruling is going to stand with respect to the privilege under 972(f) of the Evidence Code." This was a reference to the court's statement earlier that it was inclined to overrule the defense objection and allow the prosecution to call Candace as a witness.

Respondent argues appellant cannot raise this issue on appeal because Candace did not assert the privilege in the trial court, and appellant does not have standing to do so on appeal. Appellant responds that the parties litigated the applicability of the spousal privilege not to testify as if Candace was asserting the privilege. We agree. While the record does not demonstrate that Candace asserted the privilege, the trial court assumed that she had, or would, and we adopt that approach. In addition, section 918 provides: "A party may predicate error on a ruling disallowing a claim of privilege only if he is the holder of the privilege, *except that a party may predicate error on a ruling disallowing a claim of privilege by his spouse under Section 970 or 971*." (Italics added.)

From a review of this record, we conclude it is reasonable to infer that Candace was being intentionally evasive in her answers. She was aware that appellant was the focus of the police investigation of these offenses as early as September 2004. Appellant was served with a warrant for his arrest on these crimes in February 2005, several months before he married Candace. Candace never affirmatively testified that she did not know appellant had been arrested for, or charged with the murder and attempted murder crimes in this case before she married him. We find no error in the ruling that the exception under section 972, subdivision (f) applied.

II

Appellant argues that the additional term of 25 years to life added to his murder conviction in count one pursuant to Penal Code section 12022.53, subdivision (d) should not apply under the principles of double jeopardy.[4] Instead, he asserts that the enhancement should be treated as the equivalent of a lesser-included offense to murder. He recognizes that the California Supreme Court has repeatedly declined to hold that enhancements are elements of the offense for the purposes of prohibiting multiple convictions based on lesser included offenses, but raises the point to preserve it for later review. In *People v. Izaguirre* (2007) 42 Cal.4th 126, 133-134, the Supreme Court held that firearm-related enhancements do not place a defendant in jeopardy for an "'offense'" greater than the murder or the attempted murder with which he was charged. We must follow that decision. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) We find no double jeopardy violation.

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[4] Penal Code section 12022.53, subdivision (d) provides: "Notwithstanding any other provision of law, any person who, in the commission of a felony specified in subdivision (a), Section 246, or subdivision (c) or (d) of Section 12034, personally and intentionally discharges a firearm or proximately causes great bodily injury, as defined in Section 12022.7, or death, to any person other than an accomplice, shall be punished by an additional and consecutive term of imprisonment in the state prison for 25 years to life."

DISPOSITION

The judgment of conviction is affirmed.

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EPSTEIN, P.J.

We concur:

MANELLA, J.

SUZUKAWA, J.